No. 12511

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Appellants,

vs.

MALLONEE, *et al.*, SHAREHOLDERS PROTECTIVE COMMITTEE OF LONG BEACH ASSOCIATION, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, FAHEY, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

PETITION FOR REHEARING OF APPELLEE TITLE SERVICE COMPANY.

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TABLE OF AUTHORITIES CITED.

Cases

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Appellees.

PETITION FOR REHEARING OF APPELLEE TITLE SERVICE COMPANY.

Appellee Title Service Company petitions the Court of Appeals for a rehearing or reargument of the matters which vitally affect the titles to the homes of 8,000 homeowners in Long Beach and vicinity.

Appellee Title Service Company feels that it must have failed to demonstrate adequately to the Court of Appeals the true title situation of these homeowners, or the opinion filed by the Court of Appeals could not have contained its references to "failure to state any claim," and discussion that all pleadings should have been dismissed in 1946.

Before reclouding and rendering unmarketable the titles of the 8,000 homeowners occurs, appellee Title Service Company desires to have the opportunity to argue this single point to the Court, clear and apart from the many other complex questions of administrative law which seem to have obscured the former presentation of this point.

I.
ULTIMATE EFFECTS OF DECISION.

This Appellee, Title Service Company, does not believe the Court of Appeals actually intends the effects which will ensue from its opinion. If that opinion is followed by a mandate directing the dismissal of case No. 5421 PH. in the District Court, some of the proximate results will be to:

1. RENDER UNMARKETABLE AND RETANGLE BEYOND THE POWER OF ANY COURT TO CLEAR THE TITLES OF 8,000 HOMEOWNERS, until after final determination of administrative proceedings which may consume a period of years. (Federal Reserve Board v. Transamerica hearings have been proceeding intermittently since 1948.)

2. REPEAL BY IMPLICATION, THE RIGHT OF INTERPLEADER, and thereby require a trustee, at its peril, to determine, years in advance of final court decision, which of a group of contending claimants will eventually be successful in appeals or reviews before the United States Supreme Court; or, if the trustee declines to act pending decision of the litigation, render the trustee liable to the successful claimants for failure to determine in advance of final court decision, which claimants will be successsful therein.

3. REQUIRE A VAST MULTIPLICITY AND DUPLICATION OF ACTIONS. 8,000 homeowners will be required to file

several thousand separate quiet title suits, individually, by each of the homeowners, at great expense for attorneys' fees and costs, or as an alternative, the trustee itself would be compelled to file several thousand separate actions, naming each of the 8,000 homeowners defendants, in all the different courts available, hoping that some one or more of the courts or actions would eventually be held to have jurisdiction.

This seems an unnecessary waste in the light of the expense of several hundred thousand dollars in the present litigation, which vast as it is, has at least been kept before one group of federal courts, and within channels which have cleared all homeowners' titles.

II.
HOW TITLE SERVICE COMPANY WAS BROUGHT INTO LITIGATION.

This Appellee in 1946 was tendered 174 original notes and deeds of trust, with requests for reconveyances thereof, executed by A. V. Ammann as conservator for Long Beach Association, and was shortly thereafter served with summons and complaint by the Shareholders' Protective Committee of the Long Beach Association, attacking the appointment of said A. V. Ammann as fraudulent, unconstitutional and void.

The officers of the Long Beach Association informed this Appellee of some of the circumstances of the seizure of the Long Beach Association, including the fact that Ammann had signed his own order appointing himself conservator. This Appellee was also informed that most of the $12,000,000.00 of notes and trust deeds owned by the Association, upon which this Appellee was trustee, were being, or had been, assigned by said conservator Ammann to appellant San Francisco Bank.

This Appellee did not believe it was its duty as trustee to decide the constitutional and other questions brought before the Court by the Shareholders' Protective Committee, whose savings were represented in part by said $12,000,000.00 of trust deeds; nor to either convey, or refuse to convey, titles to the homes of the 8,000 borrowers at the request of any ONE of the parties to the litigation.

Sued by the Shareholders' Protective Committee as a defendant, Appellee, as trustee, interplead all titles into the registry of the District Court and sought instructions as to reconveyances. Such instructions were given by the District Court on more than fifty intervention orders, and reconveyances, pursuant to such court orders, were executed by this Appellee and delivered to the clerk of the District Court in conformity with the orders of that Court.

These reconveyances have been recorded, titles to the thousands of properties cleared, and title insurance in favor of the 8,000 borrowers and homeowners, repeatedly issued by reputable title insurance companies in reliance upon said court orders and reconveyances.

This Appellee's cross-claims in interpleader were before the United States Supreme Court in the 1946-1947 appeals, and have never been amended since that time. The mandate of the United States Supreme Court to the District Court, ordered:

". . . further . . . judicial proceedings . . ."

Writs of prohibition, injunction and/or mandamus against proceedings in the District Court were denied by the United States Supreme Court in 1947, and again denied by this Honorable Court of Appeals in June of 1950.

III.

NATURE OF TITLE SERVICE COMPANY'S ACTIONS AS TRUSTEE IN RELIANCE UPON THE DISTRICT COURT'S FINAL ORDERS.

Appellee Title Service Company, as trustee, under the deeds of trust on the homes of the 8,000 homeowners, has acted, and continues to act, under the instructions of the court below in reconveying such titles.

Such actions fall into two main classifications:

FIRST:

THE FIFTY OR MORE INTERVENTIONS BY WHICH IN EXCESS OF $1,500,000.00 WAS DEPOSITED IN THE REGISTRY OF THE DISTRICT COURT TO CLEAR THE TITLES TO APPROXIMATELY 400 HOMES.

Upon these interventions, hundreds of reconveyances of title were executed by Title Service Company and deposited with the clerk of the Court. As the money (totaling approximately $1,500,000.00) was paid into Court, the clerk of the Court delivered these reconveyances to the homeowners or their agents. The original reconveyances were recorded in the County Recorder's Office. Certified copies of the judgment of the Court were issued and filed in the County Recorder's Office, thus clearing the homeowners' titles as to these parcels.

If the money in the registry of the Court is to be returned to the borrowers and homeowners who deposited it, reinstatement of the obligations of the deeds of trust as a lien upon these real properties will be impossible.

Foreclosure of the deeds of trust to enforce payment is equally impossible. They cannot be foreclosed as deeds of trust, by sale by the trustee, because the trustee has,

by order of Court, reconveyed and released the title, and the reconveyances have been recorded. They cannot be foreclosed by court action because the statute of limitations, (four years in California, Sec. 337, Code Civ. Proc.) has expired, and in the opinion of this Appellee, any such action could and would be defeated by the plea of the statute of limitations.

The effect of dismissal upon this group of approximately $1,500,000.00 will be to necessitate return by the Court to the homeowners of their deposited money, and at the same time leave their unpaid deeds of trust on their homes unenforceable by foreclosure or otherwise, but yet a lien and cloud upon their titles because the proceedings of the District Court are held to be without jurisdiction.

SECOND:

THE REMAINDER OF APPROXIMATELY $10,000,000.00 OF DEEDS OF TRUST, CLEARED BY THE MASS INTERPLEADER OF $14,000,000.00 INTO THE REGISTRY OF THE COURT IN MARCH OF 1948.

As to this second group, many have been reconveyed by issuance of reconveyances by this Appellee, pursuant to order of Court of March 26, 1948 [R. 8534],[1] which reconveyances have been recorded and titles insured by title insurance companies in reliance thereon.

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[1]"It is further ordered that any and all endorsements appearing on each or any of the notes and trust deeds hereinafter described in favor of said Federal Home Loan Bank of San Francisco and any and/or all instruments assigning or transferring or purporting to assign or transfer said notes and/or trust deeds are hereby cancelled, and the title thereto and to each and every of such trust deeds and notes, if any title passed from said Long Beach Federal Savings and Loan Association, is hereby revested in said Long Beach Federal Savings and Loan Association."

As to these, the statute of limitations will have run on many, but not all. Immediate court foreclosure proceedings must be instituted in some court to preserve the rights to enforce payment, if the payments made into court are held to have been invalid.

But a far bigger portion, several thousand at least, have not yet been reconveyed and are assigned, according to endorsements on the notes, by undated, rubber stamped assignment, as follows (see Plate 2):

"Pay to the Order of the Federal Home Loan Bank of San Francisco

Long Beach Federal Savings and Loan Association

By A. V. Ammann

Conservator."

The San Francisco Bank action, filed with the approval of this Court of Appeals, presently seeks foreclosure of the lien of the San Francisco Bank on these deeds of trust. The Los Angeles Bank, by its complaint and cross-claims, has asserted its claims as to 5/6th of the $7,300,000.00 of its seized assets, loaned by San Francisco Bank to conservator Ammann. The Receiver for Portland, San Francisco and Los Angeles Banks has commenced both State and Federal Court actions for foreclosure of the United States Government Bonds and money in the registry of the District Court. In addition the Federal Savings and Loan Insurance Corporation has asserted that Ammann is still the validly acting conservator. [Appeal No. 12511, R. 7030-7031.]

Title Service Company must therefore refuse to reconvey unless instructed by some court as to which of the

conflicting claimants of the six groups of parties it shall obey or disregard, to-wit:

(a) San Francisco Bank;

(b) Los Angeles Bank;

(c) The Receiver for the Federal Home Loan Banks of Los Angeles, San Francisco, or Portland, appointed by the Court to bring, and who has brought, a foreclosure action against the assets in the registry of the District Court;

(d) Long Beach Association;

(e) Long Beach Shareholders' Protective Committee, Mallonee, *et al.*;

(f) Conservator Ammann.

The San Francisco Bank-Los Angeles Bank case continues pending in the District Court, as does the San Francisco Bank's own $7,000,000.00 foreclosure action, and likewise the foreclosure action by the Receiver for the Los Angeles, Portland and San Francisco Banks.

If the 1948 order of the District Court, quieting Long Beach Association's title to said $10,000,000.00 of trust deeds is void from want of jurisdiction, the homeowners' payments and the Long Beach Association's requests for reconveyances are equally futile to remove these title tangles.

This Appellee will be compelled to await judgments containing instructions from some court which does have jurisdiction. If the Federal Court in interpleader is without such jurisdiction, it seems doubtful that any competent court exists. The California courts would have no process known to this Appellee to reach conservator Ammann, absent from California for more than four years last past, and who has refused to return to complete his accounting.

IV.

CONSTITUTIONAL QUESTIONS AND CONFLICTING CLAIMS ARE TO BE DECIDED BY COURTS, NOT BY THE TRUSTEE. SUCH PROCEDURE DID NOT ORIGINATE IN THIS CASE.

The constitutional question raised by the Shareholders' Protective Committee was unanimously decided in 1946, in favor of the shareholders by a three-judge court, consisting of the Honorable William E. Orr, a Justice of this Court of Appeals, Honorable Peirson M. Hall, Judge of the United States District Court of Los Angeles, and Honorable Dave Ling, Judge of the United States District Court of Arizona. In 1947, the United States Supreme Court reversed this decision and held the statutes (Home Owners' Loan Act, etc.) constitutional.

This Appellee does not believe that among its duties as trustee, it should be compelled to foresee, either the 1946 decision of the three-judge court holding the statute unconstitutional, the 1947 decision of the United States Supreme Court holding the statutes constitutional, or the 1952 opinion of this Court of Appeals; nor does this Appellee believe its duties as trustee require that it refuse all reconveyances until the final outcome of this litigation, thereby leaving the borrowers' homes and titles entangled for six or more years.

Reconveyances by this or any trustee under deeds of trust made during the pendency of this litigation, without order of the District Court, would have been in-

effective to convey or release any titles, and would have, in addition, exposed this Appellee, as trustee, to personal and individual liability to whomever were the successful litigants in the legal proceedings, thus far approximately six years in process.

Appellants make much of the point that some of the directors of the Long Beach Federal Savings and Loan Association were also officers of this Appellee, but reluctance of Title Insurance Companies to guarantee, in advance, the decision of litigation involving constitutional questions and conflicting claims, and of trustees confronted with conflicting demands, to interplead and seek court protection, did not originate with this proceeding.

The Court's attention is respectfully directed to the Pacific States Savings and Loan seizure and liquidation where the doctrine of exhaustion of administrative remedies is nowhere involved, and where the state courts were unable to clear the title tangles for six years.

See:

Zottarelli v. Pacific States, 211 P. 2d 23, 94 Cal. App. 2d 480 (Dist. Ct. of Appeal, Calif., 1949).

The achievements of the United States District Court with the approval of the United States Supreme Court in exercising interpleader jurisdiction so that any borrower by paying his loan into the registry of the Court could immediately secure a clear and marketable title seems to this Appellee to have escaped the attention of the Court of Appeals.

V.
TITLES WILL BE RECLOUDED BY DISMISSAL.

This Court of Appeals' opinion states that notwithstanding the United States Supreme Court's remand to the District Court for:

". . . further . . . judicial proceedings, . . ."

this Appellee's cross-claim in interpleader fails to state any claim upon which relief could be granted, and should be dismissed notwithstanding said United States Supreme Court decision.

Appeals from previous interventions were taken by appellants to this Court of Appeals in 1947, and by it dismissed in 1948. (*Fahey, et al. v. Mallonee, et al.,* No. 11867, dismissed February 25, 1948.)

Any mandate of this Court of Appeals directing dismissal of these proceedings will instantly recloud the titles to the homes of the 8,000 borrowers, cleared only through the various intervention proceedings, particularly the mass interpleader by the Long Beach Association in March of 1948, of some $14,000,000.00 of notes, government bonds, and deeds of trust. By that mass interpleader, the court below cleared and quieted the title of the Long Beach Association to said deeds of trust, against the conflicting claims of the San Francisco-Portland-Los Angeles Banks. Pursuant to that Order, this Appellee, as trustee under said deeds of trust, has for the last four years reconveyed titles under said deeds of trust as directed by said Court Order.

According to the opinion of this Court of Appeals, the conflicting claims of the Los Angeles and San Francisco Banks are yet pending before the court below. The San Francisco Bank, with leave of this Court of Appeals, has filed an action to foreclose against $7,000,000.00 of the

assets yet remaining in the registry of the Court, AND ALSO AGAINST THE TRUST DEEDS, TITLES TO WHICH WERE QUIETED AND CLEARED BY THE ORDER OF THE DISTRICT COURT OF MARCH 26, 1948.

The San Francisco Bank complaint reads in part:

> "WHEREFORE, Federal Home Loan Bank of San Francisco prays judgment against Long Beach Federal Savings and Loan Association:
>
> . . .
>
> "2. For an order foreclosing the lien of said Federal Home Loan Bank of San Francisco. . . ."

This Appellee respectfully urges that whatever obligation the Shareholders' Protective Committee or the Association might have had in relation to administrative hearings and exhaustion of administrative remedies, no administrative action can, or could have, decided the ownership of the $12,000,000.00 of trust deeds, as between the claims of the Los Angeles, Portland and San Francisco Banks, nor can administrative action recall or undo the 1946-1947 assignments by Ammann as conservator of $12,000,000.00 of such notes and trust deeds to said San Francisco Bank in consideration of $7,300,000.00 of seized Los Angeles Bank assets delivered by San Francisco Bank to said conservator Ammann.

Dismissal of this Appellee's cross-claim, six years after judgments based thereon, clearing titles, and five years after refusal by the United States Supreme Court to dismiss, will of course, recloud the titles thus cleared, and Appellee must thereafter refuse to issue further reconveyances at its peril of possible liability to any or all of the litigants.

The Court of Appeals' opinion appears to hold that no cause of action in interpleader could be stated by this

CONSTRUC

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DESTROY THIS NOTE: When paid, this note, with Deed of Trust securing same, must be surrend
or cancellation, before reconveyance will be made.

Note Secured by Deed of Trust

.00 ..... Long Beach ....., California, ... May 28th ....., 1

ue received I promise to pay to Long Beach Federal Savings and Loan
iation, a Federal corporation ....., or
office of Long Beach Federal Savings and Loan Association
ncipal sum of Forty-five Hundred and no/100 ($4500.00) - - - DOL
terest from date hereof ....., 19....., on unpaid principal
6 per cent per annum, interest payable monthly on the 1st day of each
period from May 28th ....., 1945, to August 1st ....., 1
tes inclusive: commencing September 1, 1945, principal and interest payable in m
ents of Forty-five and no/100 ($45.00) DOLLARS each, on the 1st day o
and continuing until said principal and interest have been paid in full.

payment shall be credited first on interest then due and the remainder on principal; and interest shal
se upon the principal so credited. Should default be made in payment of any installment when due, or
nce of any agreement in the deed of trust securing the payment of this note, the whole sum of princi
hall become immediately due at the option of the holder of this note and shall, at the option of such
rest during the period of such default at the rate of 8 per cent per annum. Principal and interest pay
ney of the United States. If action be instituted on this note, I promise to pay such sum as the Cou
torney's fees. The holder hereof agrees to accept additional payments, provided however, that should th
qual or exceed 20 per cent of the original principal amount of the loan, 90 days unearned interest on the
d may be charged as a bonus.

note is secured by DEED OF TRUST to TITLE SERVICE COMPANY, A California corpo

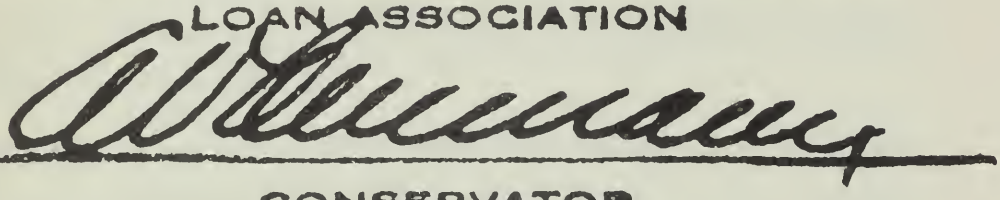
William Sharp

Evelyn A. Sharp

PLATE 2

PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO

LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION

BY 

CONSERVATOR

Appellee as trustee until conclusion of an administrative hearing.

It is respectfully urged that these dire consequences not be inflicted upon the borrowers and homeowners who have for more than four years relied upon the titles to their homes as cleared by final Federal Court judgments. Judgments, when they become final, must stand as a guide for business transactions.

The San Francisco Bank obtained leave of this Court of Appeals without any notice whatsoever to this Appellee to commence an action in the California State Court for foreclosure of a claim of $7,000,000.00, asserted against the Long Beach Federal Savings and Loan Association, and to foreclose deeds of trust once assigned to said San Francisco Bank by conservator Ammann, which assignments were cancelled in 1948 by final judgment of the District Court.

Tender of such notes and deeds of trust to this Appellee for reconveyance upon the sole order of said Long Beach Association continues to be a matter of every day occurrence. There are several thousand such notes and deeds of trust still outstanding. Attached is a photostatic copy of one of such notes, a fair specimen of the thousands (See Plate 1). It will be observed that the assignments by Ammann as conservator to the San Francisco Bank are undated (See Plate 2). The reasons for this may lie in the fact that on May 27, 1946, the District Court issued a restraining order against merger or assignment of Long Beach assets without notice to the Court No such notice was ever given. Appellee believes that most of these assignments were prior to the earliest date set for any administrative hearing, to-wit, July 3, 1946.

VI.
ADMINISTRATIVE HEARING CANNOT CLEAR TITLES.

This Appellee cannot comprehend how any administrative hearing, whether held in July of 1946 or in 1952 or 1953, can decide the question of ownership of the titles, among the conflicting claimants, San Francisco, Portland, Los Angeles Banks (and their Receiver), Long Beach Association, Long Beach Shareholders' Protective Commitee, and appellant Ammann. (In pleadings filed in July of 1949, appellant Federal Savings and Loan Insurance Corporation then claimed that appellant Ammann was yet acting as conservator for the Long Beach Association, but had been unlawfully ousted by order of the District Court of January 23, 1948.)

Dismissals by this Court of Appeals of all proceedings before the District Court might have the effect of automatically re-instating and re-appointing Amman as conservator of Long Beach Association. If this be so, the effect on the titles of the homeowners and the savings of shareholders, may well exceed the original $10,000,000.00 run of May 1946.

This appellee respectfully suggests that if, as the Court of Appeals' opinion holds, an administrative hearing is now essential, and a right of Court review thereof exists, that the title tangles cleared only by this litigation should remain clear. It is not necessary in order to have an administrative hearing to invalidate a series of final Federal Court judgments.

VII.

DISMISSAL IS NOT NECESSARY. THIS CASE MAY BE RETAINED ON THE DISTRICT COURT'S DOCKET PENDING THE ADMINISTRATIVE HEARING.

The doctrine of exhaustion of administrative remedies is not jurisdictional in the sense that no cause of action can be stated throughout any valid court proceeding. This matter may be retained on the District Court's docket pending the administrative hearing.

See:

Far East Conference, et al. v. United States of America, et al., 96 Adv. L. Ed. 390 (Mar. 10, 1952).

There is neither need nor justification for again clouding the titles to the homes of the 8,000 borrowers, merely to have an administrative hearing which must be reviewed by the courts in any event.

This Appellee therefore requests that the Court of Appeals, if it adheres to its opinion and orders dismissal, stay its mandate pending clarification by the United States Supreme Court of that Court's mandate in 1947 to the court below for

". . . further . . . judicial proceedings . . ."

or, if this Court of Appeals desires that no titles of the homeowners may be conveyed or dealt with pending the administrative hearing discussed in the opinion, that Order of the Court of Appeals be made absolving this trustee for refusing to reconvey on the demand of any litigant until after the administrative hearing be completed, and the judicial review proceedings (held by the Court of Appeals' opinion to be the right of the litigants) be instituted and decided.

VIII.

TITLE SERVICE COMPANY HAS STATED A CAUSE OF ACTION IN ITS CROSS-CLAIM AND THE COURT MUST RETAIN JURISDICTION EVEN THOUGH THE MAIN ACTION FALLS.

Title Service Company's cross-claim in interpleader states independent grounds of federal jurisdiction, both under the Interpleader Statute, old Title 28, Section 41(26), new Title 28, Sections 1335-2361, and alleged diversity of citizenship. The jurisdictional amount of $500.00 was exceeded by several million. Under these circumstances, dismissal of the original complaint or of other pleadings would not affect the jurisdiction of the Court to decide conflicting ownership claims as to the interplead notes, deeds of trust, and titles to real estate, including the titles of the 8,000 homeowners.

Railway Express v. Jones, 106 F. 2d 341, C. C. A. 7 (1939);

Isenberg v. Biddle, 125 F. 2d 741, C. C. A. D. C. (1941);

San Diego Flume Co. v. Souther, 90 Fed. 164, C. C. A. 9 (1898).

CONCLUSION.

For the protection of the 8,000 homeowners for whom this Appellee is trustee, and to prevent the reclouding of such homeowners' titles, Appellee requests an opportunity to present to the Court of Appeals, the effect on such homeowners' titles if dismissal is ordered. Application to the United States Supreme Court for certiorari will require time consuming petitions, briefs, etc., preparation of which cannot be commenced until the outcome of the petitions for rehearing is known. Stay of the issuance of a mandate by the Court of Appeals is respectfully requested if rehearing is not granted.

Respectfully submitted,

LYMAN B. SUTTER,

Attorney for Appellee, Title Service Company.

Certificate of Merit by Counsel for Trustee.

The undersigned, attorney for Appellee Title Service Company, in compliance with Rule 25 of the rules of this Honorable Court of Appeals, hereby certifies that in his judgment this petition for rehearing is justified in law, is a necessary part of said trustee's duties, and is not interposed for delay.

LYMAN B. SUTTER,

Attorney for Appellee, Title Service Company.